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No. 89-583

Supreme Court, U.S.

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IN THE

Supreme Court of the United States  
OCTOBER TERM, 1989

CLARENCE J. WILSON, *et al.*,

*Petitioners,*

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

SUPPLEMENTAL MEMORANDUM  
OF RESPONDENT  
OWENS-CORNING FIBERGLAS CORPORATION

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**SUPPLEMENTAL MEMORANDUM OF RESPONDENT  
OWENS-CORNING FIBERGLAS CORPORATION**

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Pursuant to Rule 22.6 of this Court, respondent Owens-Corning Fiberglas Corporation ("OCF") submits this Supplemental Memorandum in order to apprise the Court of certain inaccuracies in OCF's responses to petitioners' interrogatories in the District Court that have recently come to the attention of counsel. OCF is submitting this Supplemental Memorandum for the purpose of correcting the record before this Court; OCF continues to believe that this case does not warrant review and that the petition for certiorari should be denied.<sup>1</sup>

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<sup>1</sup> Copies of this Supplemental Brief are being filed with the United States District Court for the Southern District of Texas and with the United States Court of Appeals for the Fifth Circuit.

In the course of pre-trial discovery, petitioners served the below-quoted interrogatory on OCF, and OCF made the quoted response:

62. Did any division of your company or subsidiary company engaged in the contract business of applying insulation products or your workmen's compensation carrier ever have any claims for lung diseases or death from lung disease, whether directly or indirectly attributed to asbestosis, mesothelioma, lung cancer, or any exposure to asbestos products prior to 1972? If the answer is "yes," give the name of such employees and attach copies of such claims and copies of all documents relating to the disposition and handling of such claims.

A-62. Yes, this Defendant is currently involved with such claims.

This Defendant does not have the necessary information with which to answer this interrogatory; however, Defendant's insurance carrier may be able to supply the information.

In their brief to the Court of Appeals on collateral attack, petitioners cited OCF's response as support for their allegations that various asbestos manufacturers and their insurance companies had conspired over many years to withhold information concerning the alleged health hazards of asbestos. In response, OCF maintained that the interrogatory answer was correct, noting that OCF acknowledged the existence of asbestos-related workmen's compensation claims, but OCF denied having found records of such claims for periods prior to 1972 in its historical files. OCF also noted that petitioners had extensive information

on the workmen's compensation claims through their own expert consultant, Dr. Barry Castleman, who had devoted several pages in one of his books to a discussion of OCF and asbestos-related workmen's compensation claims. Also, OCF observed that petitioners had failed to follow up on OCF's suggestion that the requested information might be available from OCF's workmen's compensation insurance carrier. Ten copies of the briefs of petitioners and respondents filed in the Fifth Circuit have been lodged with the Clerk of the Court simultaneously with the filing of this Supplemental Memorandum.

OCF has recently discovered documents in its files which indicate that its interrogatory response was partially inaccurate. This discovery came about in the following manner: In October 1988, following the withdrawal of OCF from participation in the Asbestos Claims Facility (an entity that was assigned certain duties related to handling asbestos-related lawsuits and claims on behalf of OCF and other defendants), OCF reassumed direct responsibility for defense of its asbestos personal injury lawsuits. Around that time, OCF undertook a review of its files in connection with the establishment of a central document library in which documents responsive to discovery requests by asbestos personal injury claimants would be placed.

In the course of this review, OCF recently discovered two legal department memoranda (dated September 4, 1980 and October 14, 1980) which indicate that certain documents pertaining to asbestos-related workmen's compensation claims against OCF had been found at OCF's plant in Santa Clara, California in 1980. According to these legal department memoranda, these records made reference to a number of

such claims (some of which had been found in public records, the existence of which OCF has previously acknowledged) filed between 1957 and 1973, with the earliest OCF record dated 1959. Upon recently learning of these legal department memoranda, OCF commenced a search of its files for the records relating to the workmen's compensation claims mentioned in those memoranda. To date, however, OCF has been unable to locate the records themselves. The search is continuing and the records will be added to OCF's document library if and when they are located.

OCF deeply regrets the failure of its interrogatory responses in this case to reflect the information apparently available to it; OCF is taking steps to correct incomplete or inaccurate responses to similar questions in all pending cases. OCF does not, however, believe that this development is material to the instant petition.

Both in the District Court and in the Court of Appeals, petitioners cited numerous instances of alleged fraudulent concealment by various asbestos manufacturers and their insurance carriers over a period of many years. Both the District Court and the Court of Appeals assumed these allegations to be true for purposes of petitioners' Rule 60(b) motion, Pet. for Cert. App., at A-7, 873 F.2d, at 872, and the court below determined that petitioners' allegations were insufficient, under established precedent, to constitute a "fraud on the court" within the meaning of Rule 60(b). OCF's recent discovery of a single inaccurate response to a single interrogatory does not affect the correctness of that conclusion. As importantly, petitioners may present this development to

the District Court in an appropriate motion if they choose to do so irrespective of this Court's denial of review.<sup>2</sup>

November 20, 1989      Respectfully submitted,

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<sup>2</sup> Because there is no time limit for a motion under the savings clause of Rule 60(b), petitioners would be free to bring the development discussed in this Supplemental Memorandum to the attention of the District Court if their petition is denied.